State of Washington v. Eugene Riley
No. 62418-1-I

Dwyer, A.C.J. (concurring and dissenting) — As to the issues discussed in the unpublished sections of the majority opinion, I agree with the majority's analysis and concur therewith.

As to the issue addressed in the published section of the majority opinion, I do not join in the majority's conclusion that there exists a good faith exception to the article 1, section 7 exclusionary rule. I do not consider our Supreme Court to have recognized the existence of such an exception, nor do I foresee it doing so.

The majority discerns the existence of a good faith exception in large part based on its analysis of the Supreme Court's decisions in State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006), and State v. Potter, 156 Wn.2d 835, 132 P.3d 1089 (2006). I do not reach the same conclusion from these cases. To the contrary, I read the most recent of the cases, Brockob, as specifically disclaiming the implication that the court was recognizing the existence of a good faith exception to the exclusionary rule under state constitutional law:

> [Appellant] also claims that by arguing that a police officer can arrest a person based on a statute later declared invalid, the State is effectively urging the court to adopt a good faith exception to the exclusionary rule in violation of the privacy rights granted under article 1, section 7 of the state constitution. . . .This argument is without merit.

159 Wn.2d at 341 n.19; see also Brockob, 159 Wn.2d at 345 ("[T]he State has not urged us to adopt an exception to the exclusionary rule and does not need to.").[1]

Furthermore, I do not predict that the Supreme Court will recognize such an exception in the future. Our Supreme Court has "long declined to create 'good faith' exceptions to the exclusionary rule in cases in which warrantless searches were based on a reasonable belief by law enforcement officers that they were acting in conformity with one of the recognized exceptions to the warrant requirement." State v. Morse, 156 Wn.2d 1, 9-10, 123 P.3d 832 (2005). Searches conducted incident to arrest, of course, constitute one such "recognized exception." State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002).

Our Supreme Court recently refused to recognize the existence of the inevitable discovery doctrine as an exception to "the nearly categorical exclusionary rule under article 1, section 7." State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009). In so holding, the court stressed that article 1, section 7

> differs from its federal counterpart in that article 1, section 7 "clearly recognizes an individual's right to privacy with no express

[1] Similarly, I do not perceive the Supreme Court's decision in State v. Bonds, 98 Wn.2d 1, 653 P.2d 1024 (1982), as supporting the recognition of such an exception. As recently noted by the Supreme Court, Bonds involved a motion to "exclude evidence obtained through illegal but not unconstitutional means that did not violate Washington law." State v. Winterstein, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009). The result in Bonds was reached, in part, "[b]ecause there were no constitutional implications" to the decision. Winterstein, 167 Wn.2d at 632. Bonds does not apply to cases involving constitutional claims. Winterstein, 167 Wn.2d at 632.

> limitations." State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Based on the intent of the framers of the Washington Constitution, we have held that the choice of their language "mandate[s] that the right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy." Id. Because the intent was to protect personal rights rather than curb government actions, we recognized that "whenever the right is unreasonably violated, the remedy must follow." Id.

Winterstein, 167 Wn.2d at 631. These same concerns militate against recognizing the existence of a good faith exception.

Accordingly, I believe this case to be controlled by our Supreme Court's recent decisions in State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009), and State v. Valdez, No. 80091-0, 2009 WL 4985242 (Wash. Dec. 24, 2009), which collectively mandate reversal of the judgment herein and suppression of the challenged evidence.

Dwyer, A.C.J.